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No. 86-1713

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES CAPORALE, ALFRED PILOTTO, BERNARD RUBIN, GEORGE WUAGNEUX, SALVATORE TRICARIO, LOUIS C. OSTRER and JOHN GIARDIELLO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE
**The Joint Civic Committee of Italian Americans;
The Commission For Social Justice;
Order of The Sons of Italy In America; and
The Justinian Society of Lawyers**

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15 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PREFATORY STATEMENT

This brief is filed on behalf of *Amici Curiae* with consent of the parties to the pending Petition for Writ of *Certiorari* which written consent has been filed with the Court.

INTEREST OF AMICI CURIAE AND SUMMARY OF THE ARGUMENT

The Commission For Social Justice, Order Of The Sons Of Italy In America is a national fraternal organization composed of Americans of Italian heritage while The Joint Civic Committee of Italian Americans is a civic federation of Italian-Americans organizations based in Chicago, Illinois. The Justinian Society of Lawyers is a professional association of Italian-American Lawyers chartered at Chicago with chapters located in Northern Illinois, Indiana and Wisconsin.

Each of the Associations appearing as Amicus include among their basic purposes the advancement of Italian-Americans within our society as well as securing the fair administration of social justice as applied to all Americans, especially Americans of Italian ancestry.

The vast majority of Americans of Italian heritage are offended by instances of ethnic prejudice in any context. Any prejudicial reference adversely and unfairly depicting Italians appearing within our judicial system is viewed as reprehensible. When evidence of such prejudice is noted of record and brought to the attention of our Courts only to go unredressed, Italian Americans have reason to question the commitment of our system of justice to the concept of fairness and due process guaranteed to all Americans, regardless of national origin.

Amici Curiae view this case as an unfortunate but obvious instance of ethnic prejudice affecting the individual rights of the petitioners to an impartial trial and impacting adversely upon all Americans of Italian ancestry. This Court has zealously guarded the fundamental right to an impartial trial by a jury of one's peers. When jurors' com-

ments made in the course of deliberations improperly and prejudicially affect that basic right, this Court is required to insure the judiciary's vigilance in redressing verdicts so tainted.

THE PARTY SUPPORTED

This brief is submitted in support of the position advanced by the petitioners in seeking a Writ of *Certiorari* to the Eleventh Circuit Court of Appeals.

The Statement of the case has been fully set forth within the Petition for Writ of *Certiorari* filed with this Court and Statement is adopted without change.

ARGUMENT

THE JURY'S NEGATIVE ETHNIC REMARKS DIRECTED AT PETITIONERS MAY NOT BE TOLERATED UNDER OUR SYSTEM OF JUSTICE

The record below establishes that improper considerations directed at certain of the petitioners were introduced into deliberations by jurors sworn to decide the issues upon the evidence presented alone. The jurors' remarks included references to certain defendants' appearance: "That one looks like a criminal" (Tr. 10/1/84, p. 87); "That one looks like typical underworld" (p. 88); "Well, they must all be Mafia" (p. 82).

Further discussions among the jurors included accusations directed at the only Italian juror, one Curtice, to the effect that since he was of Italian descent, he must

be "one of them", that he was a "crook" or "Mafia"; all of which references were taken by juror Curtice as insulting and evidence of the other jurors feeling of "resentment" toward him and the defendants (pp. 90-92).

The record is replete with jurors remarks made during the course of their deliberations which point with alarming reality to their prejudgment rendering an impartial verdict impossible. This brief addresses the underlying causes for ethnic prejudice that continues to be exhibited against Italians and advances the obligation of the judiciary to secure relief to litigants adversely affected by such impermissible considerations during the course of trial.

In a social context, Italians as a group have never had it easy in America; however, throughout their struggle they have enjoyed the same constitutional protections afforded all individuals to a fair and impartial trial by jury.

Italians came to this country at a time when the fluid political, social and financial patterns, which had aided (and in fact speeded) the assimilation of Germans, Irish, Bohemians, Poles and Swedes in the three decades following 1870, were closed to Italians as earlier immigrant cultures became entrenched. The earlier arrivals sought to establish barriers to prevent later arriving ethnic groups from challenging their position.[1]

Hence, they did not easily assimilate into the new society. Italians was downtrodden; their language, customs and

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[1] Italians were the newest of immigrants to migrate to America with eighty percent arriving during the twentieth century. From 1820 to 1967, more than five million Italians came to this country. From 1820 to 1880, there were only 81,337 in America. Since 1930 less than 500,000 have emigrated here. *Italian Americans*, Joseph Lopreato (Random House 1970).

attire were incomprehensible. Poverty, illiteracy and the rapid arrival of Italians in great numbers hindered their acceptance within our society.

Italians found themselves in a world where their person and ethnicity were degraded, their manners and habits disdained, their work exploited, their domicile unhealthy, and their rights trampled. Demoralization thrived in such conditions and sometimes produced criminal behavior. Each of these factors delayed assimilation of the Italian into our society. *The Italians in Chicago, A Study in Americanization*, Giovanni Schiavo (Arno Press, 1975).

Preconceived notions that criminal tendencies of Italians exceed the average of the foreign born or native population often have been fed by sensationalized media development of an "Organized Network" of criminality within the Italian-American Community, a concept which is directly contrary to statistical data readily available from law enforcement departments throughout this country.

Today, organized crime has no more hold on the many millions of Italian Americans than does Chinese communism, or Italian soccer. Yet, the often perceived growth of the "Mafia" into national prominence as depicted by the media under the aegis of crooked politicians, frightened or grasping businessmen and corrupt police officers frequently makes crime sound peculiarly Italian.

Hence, while objective studies demonstrate that the achievements of Italian Americans in crucial aspects of culture are considerable by national standards still the stigma of criminality remains the knee-jerk reaction to Italians within certain segments of our society.[2]

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(Footnote continued on following page)

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Assimilation occurs when an immigrant acquires the language and social rituals of the native community and can participate without encountering prejudice in common life. This implies he is able to get on in the community on the basis of individual merit without qualifying reference to his racial or cultural inheritance.

The record of proceedings in this case demonstrates that the basic guaranty to an impartial jury trial has been compromised by the jury's inability to restrict their considerations to the evidence, and by the failure of the courts below to have ordered a new trial when confronted with evidence that the jury's determination was improperly tainted by references to ethnicity and culture abhorent to the Sixth Amendment.

The ethnic slurs uncovered during the course of the post-trial hearing demonstrate that prejudice aimed at Italians remains all too prevalent today, as we approach the Bicentennial celebration of our Constitution.

The jury's spoken preconception that Chicago "gangsters" are Italian is a product of their television mentality. "The *Untouchables*", a television program of the 1960's neglected to point out that Jews, Irish and Bohemians were numbered among the more notorious criminals. Among Chicago's most vicious offenders were Dion O'Bannion, Bugs Moran, Jake Gusick, and Hymie Weis.

While some myths are easily exploded by carefully digested fact, the underlying prejudgment against Italians is

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[2] *continued*
tration located throughout the Southern section of our country. (Supplementary Report on the Ancestry of the Population; U.S. Department of Commerce, Bureau of the Census, April, 1983). It is noteworthy that the case below was tried and the jury selected in the Southern District of Florida.

all too clearly demonstrated by jurors' statements casting the petitioners as "criminals", "typical underworld" and "all Mafia" (Tr. 10/1/84, pp. 85-89).

Such comments are obviously prejudicial, defamatory and have been held to constitute libel *per se*; See, *O'Leary v. Hearst Magazine*, 4 N.Y.S.2d 79, 167 Misc. 481 (1937). Yet, the Courts below have ignored their tainted impact upon the verdict. It is clear that such improper remarks were injurious to the petitioners; and, since nothing can be more damaging to due process in a criminal trial than a preconceived notion of the petitioners as underworld Mafia gangsters, such characterizations adversely affected their right to a fair trial and to a verdict based solely on the evidence presented.

Prejudice is always a serious matter. In this case, the jury's notion of a corrupt ethnic predisposition goes to the very crux of the petitioners' right to receive a fair trial, a trial free from prejudgment founded upon improper consideration of ethnic propensity to criminality.

Certiorari is required in this case to reinforce the rule of law established by the Eleventh Circuit Court of Appeals' recent decision in *United States v. Heller*, 785 F.2d 1524 (1986) which reversed the conviction of a Jewish defendant based upon anti-Semitic jokes and comments made by jurors during the course of deliberations. The ruling in *Heller* appears to have been abandoned by the Court of Appeals by its failure to have applied the same standard to slurs directed at the Italian heritage of the petitioners. It has refused to order a new trial under circumstances where the prejudice displayed by the jurors is at least as shocking and more pernicious than the jurors' anti-Semitic jokes directed against Heller.

The conclusion reached by the Court below is incomprehensible in view of the earlier mandate of the same Court of Appeals. How one decision of the court could find such pathos for anti-semitism and another literally decline to apply the same principle to Italian Americans is inexplicable.

The *Heller* court observes that:

> "The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision making that both the Sixth Amendment and fundamental fair play require. A racially or religiously biased individual harbors certain negative stereotypes which despite his protestation to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires." 785 F.2d at 1527.

In the opinion below, the notion of fundamental fair play never came into consideration as a factor even though the record is replete with negative stereotypes that preclude an unbiased verdict. Such highly prejudicial comments may never simply be dismissed as, "inappropriate jokes":

> " 'humor' is by its very nature an expression of prejudice on the part of the maker . . . those who made the jokes at trial and those who reacted to them with 'gales of laughter' displayed the sort of bigotry that clearly denied the defendant, Heller, the fair and impartial jury that the Constitution mandates.", *Heller*, 785 F.2d at 1527.

Under circumstances demonstrating a similar predisposition on the part of jurors, other courts of review have acted to negate a verdict compromised by considerations having no place in our system of justice.

Several cases involve facts similar to this case establishing that during jury deliberations one or more of the

jurors made statements or arguments disclosing prejudice against the ethnicity, race or religion of the defendant or the defendant's witnesses. In each instance, the reviewing court has held that their presence requires that the convictions be set aside.

During deliberations of the jury in a prosecution of the accused, a Jew, for committing a private act of lewdness, a female member of the jury commented on the fact that most of the character witnesses were Jews and that one of them was from the Synagogue; there the court held that the trial judge did not abuse his discretion in setting aside the jury verdict and granting a new trial on the ground that the element of religious prejudice had contaminated the jury verdict of conviction, *State v. Levitt*, 36 N.J. 266 (1961).

Where, during the retirement of the jury in a burglary case, remarks were made by jurors that the defendant was "nothing but a damn negro anyhow", that it would not hurt him to serve time in the penitentiary if he was innocent, that negroes have been running over "Polanders" and imposing on them; and, where the jury discussed the character of the accused and his family and jurors were rather harsh on a juror who disagreed, it was held in *Gilford v. State*, 49 Tex. Cr.R. 275, 92 S.W. 424 (1906), that the conviction would be set aside. The reviewing court observed that if the evidence was sufficient to sustain the verdict, the consideration of the jury should be relegated alone to the facts under the charge given by the Court, that extrinsic evidence and extraneous matter should not be gone over in the jury room, nor permitted to enter into their decision of the case.

In the trial of a negro for murder, during the jury's discussion as to whether or not the sentence should be suspended, one juror told the others that the government

was having trouble with negroes, "as was shown by some recent riots at Houston by negroes". On review it was held that a motion for a new trial should have been granted, *Mason v. State*, 147 Tex. Cr.R. 143, 179 S.W.2d 562 (1944). In reversing Mason's conviction, the Court stated that the discussion referred to was outside the record and evidenced misconduct on the part of the jury sufficient to justify a reversal of the conviction.

In *People v. Leonti*, 262 N.Y. 256, 186 N.E.693 (1933), a case involving a prosecution of a Sicilian defendant for murder, it appeared that the *voir dire* examination of one who was later accepted as a juror evoked a response that he had no prejudice against Italians of foreign birth, that he could be impartial and could accord to defendant the same consideration he would give anyone. Following rendition of the verdict in that case, undenied affidavits were produced attributing the following statement to that juror:

> "I wouldn't believe a Sicilian under oath, and none of the jurors would . . . until the defendant took the stand I had some doubts, but when he took the stand and I found out that he was a Sicilian, I no longer had any doubts."

The Court, in reversing the judgment of conviction and ordering a new trial, noted that the affidavits constituted convincing proof that this talesman never was eligible to become a member of the jury, that from the beginning he was disqualified on the ground of prejudice and that the interests of justice required a new trial.

In comparing the facts of this case with the similar evidence of predisposition uncovered in each of the foregoing decisions it is difficult, at best, to rectify their conflicting results. In the case under consideration, there exists more than a reasonable likelihood that the jury's pernicious references are indicative of a predisposition of guilt requiring reversal of the convictions.

CONCLUSION

Our system of justice is designed to ferret out discrimination adversely affecting the constitutional rights of litigants. When instances of prejudice are clearly established and shown to have tainted the determination of the trier of fact, action is mandated.

It is hoped that with the passage of time and with greater understanding, preconceived adverse notions of nationality such as those uncovered by the record in this case will be overcome. However, the petitioners are entitled to relief at this time—relief possible only through this Court's intervention.

Respectfully submitted,

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